IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 1401 of 1993

For Approval and Signature:

Hon'ble MR.JUSTICE M.C.PATEL
and
Hon'ble MR.JUSTICE A.L.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

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BHAVESHBHAI BHALABHAI PATEL
Versus
STATE OF GUJ.

Appearance:
1. Criminal Appeal No. 1401 of 1993
MR DD VYAS for Petitioner No. 1
MR HL JANI, APP, for Respondent No. 1

CORAM : MR.JUSTICE M.C.PATEL
and
MR.JUSTICE A.L.DAVE

Date of decision: 03/04/2002

ORAL JUDGEMENT

(Per : MR.JUSTICE A.L.DAVE)

1. This appeal arises out of a judgment and order rendered by learned Additional Sessions Judge, Navsari,

in Sessions Case No.65 of 1991 on October 30, 1993, convicting the appellant for the offences punishable under Sections 302 and 324 of Indian Penal Code and sentencing him to imprisonment for life and a fine of Rs.500/- and, in default, rigorous imprisonment for six months for the offence punishable under Section 302; and rigorous imprisonment for six months and a fine of Rs.100/- and, in default, rigorous imprisonment for 15 days for the offence punishable under Section 324. The learned Additional Sessions Judge has also directed that the sentences shall run concurrently.

2. The appellant along with two other accused persons, namely, Harishbhai Bhanabhai and Jyotiben Manojbhai, was charged to have caused fatal injuries to Dhirubhai Naranbhai with an axe on 3.3.1991 at about 7.30 P.M. at Vachala Falia of village Delvada. As per the prosecution case, he had sent a word to deceased-Dhirubhai Naranbhai through one Nanubhai. Responding to that call, deceased-Dhirubhai Naranbhai along with Raghubhai went on his motorcycle to the house of the appellant. The moment the motorcycle was stopped, the appellant assaulted upon the duo who had gone on the motorcycle with an axe and caused injury to Raghu initially and then to deceased-Dhirubhai. One of the neighbouring witnesses-Chhimiben Ravji went there to prevent further developments and Jyotiben Manojbhai caused injury on her head with a pestle. A complaint came to be lodged by Chhaganbhai Govindbhai Kolipatel in this regard with Jalalpur Police. The offence was registered and investigated upon. Having found sufficient evidence against the appellant as well as Harishbhai Bhanabhai and Jyotiben Manojbhai, the police charge sheeted all three of them in the Court of learned Judicial Magistrate, First Class, Navsari. The learned judicial Magistrate, First Class, after following the procedure, committed the case to the Court of Sessions and Sessions Case No.65 of 1991 came to be registered.

2.1 Charge against the accused persons was framed at Ex.1 and all the three accused persons pleaded not guilty to the charge and claimed to be tried.

2.2 Considering the evidence led by the prosecution, learned Additional Sessions Judge came to a conclusion that the prosecution could only establish the charges against the appellant for the offences punishable under Sections 302 and 324 of I.P.C. Rest of the charges against the appellant and all the charges against the rest of the two accused persons, namely, Harishbhai Bhanabhai and Jyotiben Manojbhai, were found to have been

not proved beyond reasonable doubt and benefit was given to those two accused persons whereas the appellant came to be convicted and sentenced, as stated above. Aggrieved by the conviction and sentence, the appellant has preferred this appeal.

3. Aggrieved by the acquittal of other two accused persons, namely, Harishbhai Bhanabhai and Jyotiben Manojbhai, the State preferred Criminal Appeal No.162 of 1994. That appeal came to be dismissed by this Court summarily by an order dated June 27, 1994 and, as such, this Court is required to consider only the contentions raised by this convict accused.

4. Learned Senior Counsel-Mr. D.D. Vyas has taken us through the record and proceedings. He submitted that the Court below has committed an error in appreciating the evidence on record. According to Mr. Vyas, the prosecution version has changed the colour according to the changing requirement for securing conviction. Every witness has tried to deviate from his original version to suit the evidence of the preceding prosecution witness. The improvements in the depositions, though they patently appear to be natural or innocent, are designed to prove the prosecution story so as to fit into the requirements of the prosecution case for securing conviction. This aspect has been lost sight of by the Court below. Mr. Vyas, therefore, urged that the evidence has to be evaluated from this angle.

4.1 In order to substantiate his contention, Mr. Vyas has drawn attention of this Court to deposition of complainant Chhaganbhai Govindbhai (Ex.27). Mr. Vyas submitted that this witness, in the complaint, does not say that the deceased was summoned by the appellant through Nanubhai. But in order to explain the presence of the deceased at the place of the incident, which is near to the house of the appellant, this version is added in his deposition. Mr. Vyas submitted that, according to this witness, he was told by Urmilaben, wife of deceased-Dhirubhai, to go to Delvada as Dhirubhai was summoned by the present appellant and she apprehended some quarrel. He, therefore, went to Delvada running and noticed that no sooner the deceased reached the place on motorcycle, the appellant inflicted axe blow. Differently put, without any verbal exchange, quarrel or dispute, the blow was given. Mr. Vyas submitted that, physically, it is not possible because admittedly, the deceased and Raghu had proceeded to Delvada on motorcycle. Thereafter, Dhirubhai's wife approached the witness-Chhaganbhai, apprised him of the fact and told

him to go to Delvada, whereafter the witness left for Delvada on foot. He, therefore, could not have been present at the place of incident when the blow was given, as claimed by him, immediately on Dhirubhai reaching the place.

4.2 As regards Chhimiben (Ex.33), Mr. Vyas submitted that she is an old lady with an impaired vision. She admits that she is unable to see beyond 10 feet. On the contrary, she was standing just outside the house of Nanubhai, which is in front of the house of the appellant and the distance between the two is about 23 feet. This witness, therefore, could not have seen the incident. Mr. Vyas submitted that to overcome this difficulty, prosecution witness-Hansaben (Ex.54) says that Chhimiben does not suffer from any impairment of vision and her vision is unaffected. Mr. Vyas, therefore, urged that the prosecution has tried to improve the story and thereby plucked the lackings in the evidence.

4.3 Mr. Vyas submitted that, apart from this, the version given by the eye-witnesses is falsified by medical evidence. He has drawn attention of this Court to the deposition of Dr. Dinesh Jairam Bhandari (Ex.16), Dr. Anil M. Naik (Ex.21) and Dr. Parimala Joshi (Ex.23). He submitted that if these depositions are seen, the version of the so called eye-witnesses crushes to the ground. He clearly admitted that the injuries on Raghu were not possible with the muddamal-axe whereas eye-witnesses say that injury was caused to Raghu with muddamal-axe. Likewise, the eye-witnesses say that axe blow was given on the right side of the head of the deceased whereas the medical evidence is otherwise. Therefore, the evidence of these eye-witnesses suffers from the defect of corroboration. In fact, it gets falsified by medical evidence.

4.4 Mr. Vyas submitted that the witnesses have admitted that before they entered the box, their statements were read over to them by police and, therefore, they were tutored witnesses. Reliance could not have been placed on depositions of such witnesses for recording conviction by the Trial Court.

4.5 Mr. Vyas further submitted that the prosecution has not been able to show any justifiable cause for Raghu and deceased-Dhirubhai to go to the house of the appellant and that is tried to be camouflaged by improving and adding the version that they have been called by the appellant.

4.6 It was contended that the conduct of the eye-witnesses is also strange. None of them gives name of the assailant initially till their statements are recorded by the police. Admittedly, the doctor had asked about the history, but the witnesses did not give any name of the assailant. If the incident was witnessed by them, they would have definitely given the name of the assailant.

4.7 The prosecution has not been able to indicate any motive for commission of the crime. Mr. Vyas, therefore, urged that the prosecution is not coming with the correct or true facts of the case. The investigation is not honest, if not dishonest. He, therefore, urged that the appellant's appeal may been accepted and he may be acquitted of the charges levelled against him by setting aside the judgment and order of conviction.

4.8 By way of alternative submission, Mr. Vyas submitted that there is evidence to show that just before the incident, there was verbal exchange between the deceased and the appellant. Some quarrel had taken place. There is evidence to show that the house of the appellant has been damaged in the episode and, therefore, the incident has taken place all of a sudden without pre-planning. Mr. Vyas, therefore, submitted that the conviction under Section 302 may be altered to that under Section 304, I.P.C.

5. The appeal is opposed to by learned Additional Public Prosecutor Mr. Jani. He submitted that conviction is rightly recorded. He submitted further that even if depositions of the complainant and Chhimiben are ignored, there are other independent eye-witnesses to the incident. Their evidence cannot be ignored and the learned Additional Sessions Judge, considering these various pieces of evidence, has rightly recorded conviction and there is no scope for any interference at the hands of this Court in this appeal. He, therefore, urged that the appeal may be dismissed.

6. We have considered the contentions raised before us by learned Senior Counsel-Mr. Vyas in light of the evidence on record.

7. The complainant-Chhaganhai Govindbhai (Ex.27) states that the incident occurred on 3.3.1991 at about 7.15 P.M. He was at his residence at village Vadoli. His house is located just opposite to the house of Dhirubhai Naranbhai, the deceased. At about 7.15 P.M. on 3.3.1991, when he was at home, he saw that deceased

Dhirubhai and his wife Urmilaben were at their home. He also noticed that Nanubhai Ravjibhai had come from Delvada to call Dhirubhai and, therefore, Dhirubhai and Raghubhai went together on the vehicle. He saw that the appellant gave an axe blow on Raghubhai which was taken on hand by Raghubhai. The vehicle, therefore, fell down. the second blow was given by the appellant on Dhirubhai with the axe. Vadoli and Delvada are at a distance of about one furlong and he had reached Delvada running. He was aware about the dispute between the appellant and the deceased, who happened to be cousins. He says that before he could reach near the place, the blow was already given. He speaks of presence of Chhimiben and her having sustained an injury on her right hand. This witness did not fully support the prosecution case and was declared hostile by the prosecution. However, in examination-in-chief to the Public Prosecutor, he fully supports the prosecution case and states that Urmilaben had come to his house on the day of the incident and told him that Dhirubhai was summoned by the appellant and they have gone on motorcycle and then told him to go and prevent any quarrel. The witness has been cross-examined at length on minutest details. But, in our opinion, he sticks to his version implicating the appellant. He admits that, in his complaint (Ex.28), he has not stated that Nanubhai had come to call the deceased. He also admits to have not stated in the complaint about Jyotiben having caused any injury to the complainant. He clearly admits that he desires that the accused persons should be punished since Dhirubhai had expired.

7.1 The complaint, if perused, it is found that it is true that the witness has not stated in the complaint that Nanubhai was sent to call Dhirubhai but the contents do reveal that the deceased was called upon by the appellant. The only missing part is name of Nanubhai. As such, it cannot be considered as a material contradiction. The fact remains that the deceased was called by the appellant.

8. Likewise, it requires to be noted that the distance between Vadoli and Delwada is only a furlong and the witness says before he could reach near the place of incident, the axe blow was given. Thus, he has seen the incident from a distance, not after going very close to the place of incident. The timing part, as argued by learned Senior Counsel, therefore, does not assume much importance.

9. Apart from Chhaganbhai Govindbhai, there is evidence of Sukhabhai Keshavbhai (Ex.29), who has also

witnessed the incident. He clearly implicates the appellant and states that axe blow was given by the appellant on head of Dhirubhai. He also speaks of injury having been caused to Raghubhai with the axe by the appellant. This witness has also been cross-examined at length and he sticks to his version in the examination-in-chief and he states that the statements of the witnesses were recorded together by the Investigating Officer. He says that he was not called by anyone but he had gone close to the place of incident, so that he could hear what transpired. The witness is an aged man from village Delvada and his typical villager temperament and tendency is reflected by his trying to overhear what transpired between the deceased and the appellant. This reflects that he gives a frank and correct version of what he has noticed. This witness has stated in his cross-examination that there was sufficient light at the place the incident coming from the house of the appellant and three other houses. He says that it was dark at the time of the incident, but he could see the incident because of the light.

9.1 This witness is also a witness to the Panchnama of the place of incident.

10. Witness-Raghuhai Prabhubhai (Ex.31) is also an eye-witness, who sustained injury on his hand. He clearly states that no sooner did they reach Delvada than the appellant gave an axe blow which he received on his hand, due to which he and Dhirubhai both fell down from the motorcycle and, at that time, the appellant inflicted a blow on the head of the deceased with the axe. He speaks of presence of Chhimiben and Chhimiben having been assaulted upon by Jyoti. He has been cross-examined. He says that the incident lasted for an hour. Injury was caused with the sharp edge of the axe. His shirt was blood stained, which was not seized by the police. He says that he had not disclosed names of the assailants to the doctor when the doctor inquired of him about the history. He says that 2-5 blows were given. He denies a suggestion that he had not seen the incident. He says that he had attended the Court on the previous adjournment. Thus, this witness speaks about the incident and implicates the appellant in clear terms. There is medical evidence to indicate that he had sustained injuries on his hand. His version is supported by other eye-witnesses. Excepting the say of Dr. Bhandari (Ex.15) that the injuries found on person of this witness were not possible with the axe (muddamal article No.9) there is nothing to doubt the deposition of this witness. The doubt that is tried to be highlighted

and magnified through this medical evidence becomes insignificant by deposition of the doctor during cross-examination to the effect that his medical knowledge is limited and he does not claim to be an expert on the subject. This admission, therefore, wipes out the doubt that is sought to be highlighted for not believing the deposition of Raghubhai.

11. The next eye-witness is Chhimiben (Ex.33). She also states that she had witnessed the incident. She noticed the appellant causing injuries to deceased-Dhirubhai. She says that her son Nanu had called Dhirubhai at the behest of the appellant. At the time of the incident, she was sitting outside her house on the Otta. The moment deceased-Dhirubhai and Raghu came, axe blow was given by Bhavesh (the appellant). The injury was caused on head of Dhirubhai. Harish was with Bhavesh (the appellant). Jyoti was also with them. Jyoti caused injury to her with a pestle. During cross-examination, she states that the distance between her house and the place of incident is about 10 feet. She, at a later stage, in cross-examination, states that she can see upto 10 feet and not beyond. She states that she cannot see in moonlight, but because other light was there, she saw the incident. It was much emphatically argued that she could not have seen beyond 10 feet, whereas, as per the Panchnama and the map, the distance between the two houses is more than 29 feet and, therefore, she could not have seen the incident. This contention is difficult to be accepted for the reason that the deposition as a whole has to be considered. The social background of the witness has also to be considered. This witness is a rustic village woman engaged in labour work and she is not educated. It is her standard of assessment for measures that will have to be applied and accepted while appreciating her evidence. It is true that the distance between the two houses is more than 23 feet as per the Panchnama. But to this rustic uneducated village woman, the distance is only 10 feet and as per her deposition, she can see upto a distance of 10 feet, which is to be measured with this standard and, therefore, this 10 feet would mean the distance between the two houses which is more than 23 feet. It would be improper to take a technical view in interpreting the deposition of such a witness as it would be unjust to her because by doing so, a rustic simpleton villager would be branded as unreliable and untruthful witness. A stray sentence cannot be lifted for assessing the veracity of the evidence of a witness. In our opinion, therefore, it cannot be accepted that the witness could not have seen the incident, as she was at a

distance of about 23 feet.

11.1 It was also contended that what is stated by the witness is not correct and is not supported by medical evidence. The witness, in cross-examination, has stated that axe blows were given on neck by the appellant and as a result of those injuries neck of the deceased was hanging. This is not found either in the postmortem notes or in deposition of the doctor and, therefore, it was urged that this witness is exaggerating things only to achieve the ultimate goal of conviction. She is interested in seeing that the accused persons are convicted. The cross-examination is on every minutest details and certainly the witness would carry an impression that an attempt is made to prove her version as false by putting questions as to minutest details. A truthful witness also would be tempted to assert and exaggerate certain things only in an attempt of saving himself of being labelled as a false witness and these minor exaggerations or embroidery has to be accepted and truth has to be discerned from such embroidery. In this regard, in the case of State of U.P. v. Anil Singh, A.I.R. 1988 SC 1998, the Apex Court observed thus:-

> "15. It is also our experience that invariably the witnesses add embroidery to prosecution story, perhaps for the fear of being disbelieved. But that is no ground to throw the case overboard, if true, in the main. If there is a ring of truth in the main, the case should not be rejected. It is the duty of the court to cull out the nuggets of truth from the evidence unless there is reason to believe that the inconsistencies or falsehood are so glaring as utterly to destroy confidence in the witnesses. It is necessary to remember that a Judge does not preside over a criminal trial merely to see that no innocent man is punished. A Judge also presides to see that a guilty man does not escape. One is as important as the other. Both are public duties which the Judge has to perform."

As stated above and as observed by the Apex Court, we find that the witness is a rustic villager and has given the version which is otherwise supported through the evidence of other eye-witnesses. Therefore, these exaggerations do not render the deposition as unbelievable.

12. Hansaben Nanubhai (Ex.34) is also an eye-witness to the incident. She is an independent witness not connected with either of the parties. Her presence at the place of incident is natural. She happens to be wife of Nanubhai. She says that the appellant told her husband to call Dhirubhai (the deceased) and, therefore, her husband went on his moped (Luna) to call Dhirubhai. After his arrival, she was sitting on the Otta along with her husband and children. At that time, Dhirubhai came on a vehicle, which was driven by Raghu. They stopped the vehicle in front of the door of the house of the appellant. The appellant came and inflicted a blow on Raghu with an axe. The injury was caused on his hand. The second blow was given immediately to Dhirubhai on the head because of which he expired. She also speaks of injury caused by Harishbhai and Jyotiben with which at present we are not concerned. She also speaks of presence of Chhimiben. She says that Chhimiben, who is her mother-in-law, does not have any impaired vision. During cross-examination, she states that neither she nor her husband initially told anyone about having seen the incident and not even the police. It emerges from her cross-examination that village people had caused damage to the house of the appellant. Despite a lengthy cross-examination, she sticks to her original version about the appellant having given the blow to the deceased with an axe.

13. From the depositions of the above eye-witnesses, it is clear that the appellant was involved in the incident and that he caused the fatal injury to the deceased. There is medical evidence to indicate that the injury was sufficient in ordinary course of nature to cause death and that the said injury was responsible for the death.

14. In our opinion, depositions of these witnesses cannot be rejected for the reasons stated by the learned Senior Counsel for the appellant, namely, that they improved the story; that there are exaggerations; and that the medical evidence does not lend support to the version of these witnesses. As discussed above, the improvements as such are not improvements to render the depositions unreliable. They cannot be branded as improvements tailored to suit the requirements of the prosecution case and going to the root of the case. In fact, the improvements are not improvements at all. They are mere change in the language employed and a little more accurate version of what the witnesses had seen. Likewise, the exaggerations are also not such as would go

to the root of the case. The depositions are found by us to carry a ring of truth. The witnesses are simpleton villagers and it would not be proper to expect them to know the intricacies of legal proceedings and impact of some statement or admission made by them innocently.

15. It was argued that, in any case, the case could not have fallen under Section 302 of I.P.C. as there is evidence to show that there was some quarrel before the incident. Attention of this Court is drawn to deposition of Chhimiben where she states during cross-examination that prior to the incident, there was verbal exchange of abuses between the appellant and the deceased-Dhirubhai. Beyond this, there is no material to convince this Court that the case may fall under any of the exceptions to murder and would be covered under the umbrella of culpable homicide not amounting to murder. This aspect of some exchange of verbal abuses comes only in deposition of Chhimiben and no other witnesses. Not even a suggestion is made to any of the witnesses to this effect. It is, therefore, not possible to accept the alternative submission that the conviction may be altered to one under Section 304 of I.P.C.

16. The eye-witness not giving the name of the assailant before the doctor or anybody else by itself would not render their depositions untrustworthy. Their versions are consistent. It cannot be overlooked that the incident has taken place in a village in the early evening hours and the police comes and records the statement. Not informing the doctor about the name of the assailant by itself does not raise any doubt unless other material is shown to doubt the veracity of the deposition of the witnesses.

17. Absence of motive was also indicated as one of the factors in favour of the appellant. In our view, when there is so much of direct evidence, absence of motive would not be pertinent.

18. It was argued that there is discrepancy between the medical evidence and the evidence of the eyewitnesses. It has to be observed that the eye-witnesses have given consistent version with each other and the medical evidence cannot falsify the occular evidence which is otherwise found to be trustworthy. The main ground on which the occular evidence was assaulted was that medically it was found that the injury on Raghubhai could not have been caused by the axe (muddamal article No.9), but the doctor himself has admitted that his medical knowledge is limited and he does not claim to

be an expert on the subject.

18.1 About the variance in the site of injury on person of the deceased, in our opinion, much importance cannot be attributed to such variance for the reason that the incident occurred before people even realised as to what was happening. Immediately when the deceased reached the place of incident and he was assaulted upon by the appellant and, therefore, it would depend on the power of observation of each of the witnesses and the ability to describe and express as to what was seen by the witnesses. Only for this purpose, the deposition of eye-witnesses cannot be discarded.

19. Having considered the evidence as a whole, we find that the Trial Court has rightly held that the prosecution could establish the case against the appellant. We do not find any reason to interfere with the order of conviction and sentence. The appeal deserves to be dismissed and the same is, therefore, dismissed.

[M.C. PATEL, J.]

[A. L. DAVE, J.]

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